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COUNTERSTATEMENT OF THE QUESTION PRESENTED

When a prisoner's claim under 42 U.S.C. § 1983 seeks only damages and injunctive relief for prison administrative procedures that violate the Due Process Clause, and does not seek any judicial determinations which would necessarily imply the invalidity of the disciplinary hearing result, or duration of confinement, as mandated by *Heck v. Humphrey,* must the prisoner first succeed in overturning the unaffected disciplinary hearing result or sanction?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

I. STATEMENT OF THE CASE 1

II. PROCEEDINGS BELOW 3

III. SUMMARY OF ARGUMENT 6

IV. ARGUMENT 11

A. Mr. Balisok's § 1983 Complaint is the Type of Lawsuit Permitted by This Court's Ruling in Heck v. Humphrey 11

B. Mr. Balisok's § 1983 Complaint is Precisely the Type of Procedural Due Process Challenge that is Permitted Under Wolff 17

C. Finding that Mr. Balisok was Deprived of Procedural Due Process Would Not Necessarily Imply the Invalidity of His Disciplinary Hearing Result 21

D. Finding That Mr. Balisok Was Deprived of Procedural Due Process Would Not Preclude the State Court From Conducting an Independent Review in a Habeas Corpus Challenge 26

E. A § 1983 Lawsuit That Does Not Implicate the Prison Hearing Result or Sanction Requires No Prior Successful Challenge ... 27

F. An Amended Complaint Entirely Supersedes the Original Complaint 30

TABLE OF CONTENTS – Continued

Page

G. This Court Should Not Overrule Wolff v. McDonnell and Heck v. Humphrey by Adoption of Petitioners' Proposed Rule ... 34

1. Petitioners' Proposed Rule Is Unworkable 34

2. Petitioners' Proposed Rule Would Deny Prisoners Any § 1983 Relief for Procedural Due Process Claims 36

3. Prisoner § 1983 Claims for Violations of Procedural Due Process Will Not Interfere with Prison Administration 40

H. Congress is the Proper Governmental Body to Add Limitations and Exhaustion Requirements to § 1983 41

1. Congress Has Addressed the States' Concerns For § 1983 Prisoner Claims 44

I. 42 U.S.C. § 1983 Recognizes the Fundamental Role of the Federal System in Protecting Those Constitutional Rights Guaranteed to All Citizens, Even Prisoners 46

V. CONCLUSION 49

TABLE OF AUTHORITIES

Page

CASES:

Allen v. McCurry, 449 U.S. 90 (1980) 37

Armento-Bey v. Harper, 68 F.3d 215 (8th Cir. 1995) 34

Berkovitz v. United States, 486 U.S. 531 (1988) 1

Best v. Kelly, 39 F.3d 328 (D.C. Cir. 1994) 35

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 34, 35, 41

Black v. Coughlin, 76 F.3d 72 (2nd Cir. 1996) 34

Boelens v. Redman Homes, 759 F.2d 504 (5th Cir. 1985) 30

Bounds v. Smith, 430 U.S. 817 (1977) 31

Bourgeois v. Murphy, 119 Idaho 611, 809 P.2d 472 (1991) 5

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 38

Carey v. Piphus, 435 U.S. 247 (1978) 8, 28, 29, 30

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 11

Cleavinger v. Saxner, 474 U.S. 193 (1985) 41

Colon v. Coughlin, 58 F.3d 865 (2d Cir. 1995) 38

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 39

Cort v. Ash, 422 U.S. 66 (1975) 31

Daniel v. Fields, 66 F.3d 338 (10th Cir. 1995) 35

Dog Essence Saladin Amin v. Pruett, ___ F.Supp. ___, Civ. No. A. 2:94CV635, 1996 WL 341522 (E.D. Va. June 12, 1996) 35

TABLE OF AUTHORITIES – Continued

Page

Elkin v. Fauver, 969 F.2d 48 (3d Cir. 1992) 16

Farmer v. Brennan, 511 U.S. 825 (1994) 11

Farrar v. Hobby, 506 U.S. 103 (1992) 29, 30

Federal National Mortgage Association v. Cobb, 738 F.Supp. 1220 (1990) 30

Ferdik v. Bonzelet, 963 F.2d 1258 (9th Cir. 1992) 30

Fry v. UAL Corp., 895 F.Supp 1018 (N.D. Ill. 1995) 32

Fuentes v. Shevin, 407 U.S. 67 (1972) 13

Giakoumelos v. Coughlin, ___ F.3d ___, 1996 WL 362708 (2d Cir. 1996) 38

Gotcher v. Wood, 66 F.3d 1097 (9th Cir. 1995) 12, 28, 35

Haines v. Kerner, 404 U.S. 519 (1972) 33

Hawkins v. Risley, 984 F.2d 321 (9th Cir. 1993) 37

Heck v. Humphrey, 114 S.Ct. 2364 (1994) ..... *passim*

Hernandez v. Denton, 861 F.2d 1421 (9th Cir. 1988) *vacated and remanded on other grounds*, 504 U.S. 25 (1992) 46

In re Burton, 80 Wash. App. 573, 910 P.2d 1295 (1996), rev. denied ___ Wash. 2d ___ (1996) 5, 21, 24

In re Hunter, 43 Wash. App. 174, 715 P.2d 1146 (1986) 21, 23

In re Reismiller, 101 Wash. 2d 291, 678 P.2d 323 (1984) 5, 21, 22, 23

Jones v. Moore, 996 F.2d 943 (8th Cir. 1993) 37

TABLE OF AUTHORITIES – Continued

Page

King v. Atiyeh, 814 F.2d 565 (9th Cir. 1987) 30

Lato v. Sieverman, 919 F.Supp. 336 (N.D. Cal. 1996) 37

Lewis v. Casey, 64 U.S.L.W. 4587, 1996 WL 340797 (1996) 1

Loux v. Rhay, 375 F.2d 55 (9th Cir. 1967) 30

Madrid v. Gomez, 889 F.Supp. 1146 (N.D. Cal. 1995) 47, 48

Martin v. Sias, ___ F.3d ___, No. 95-36118, 1996 WL 368840 (9th Cir. 1996). 35

Martucci v. Taylor, 59 F.3d 170 (6th Cir. 1995). 34

McCarthy v. Madigan, 503 U.S. 140 (1992). 42

McGrew v. Texas Bd. of Pardons, 47 F.3d 158 (5th Cir. 1995) 35

Miller v. Indiana Dept. of Corr., 75 F.3d 330 (7th Cir. 1996) 34

Mireles v. Waco, 502 U.S. 9 (1991) 1

Patsy v. Board of Regents, 457 U.S. 469 (1982) ... 10, 41, 42

Petition of Anderson, 112 Wash. 2d 546, 772 P.2d 510 (1989), cert. denied, 493 U.S. 1004 (1989) ... 5, 21, 23, 24

Petition of Fogle, 128 Wash. 2d 56, 904 P.2d 722 (1995) 12

Petition of Johnston, 109 Wash. 2d 493, 745 P.2d 864 (1987) 5, 21, 24

Preiser v. Rodriguez, 411 U.S. 475 (1973) 17, 18, 31, 36, 44

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) 38

TABLE OF AUTHORITIES – Continued

Page

Rhodes v. Hannigan, 12 F.3d 989 (10th Cir. 1993) 37

Rooding v. Peters, 876 F.Supp. 946 (N.D. Ill. 1995) 37

Sandin v. Conner, 115 S.Ct. 2293 (1995) 12

Sheldon v. Hundley, 83 F.3d 231 (8th Cir. 1996). 35

Superintendent, Mass. Corr. Institution v. Hill, 472 U.S. 445 (1985) 7, 13, 24, 25, 34, 41

Tate v. Dubois, 78 F.3d 577 (1st Cir. 1996). 34

Tower v. Glover, 467 U.S. 914 (1984). 45

United States v. Herron, 45 F.3d 340 (9th Cir. 1995) 23

Washer v. Bullitt Co., 110 U.S. 558 (1884) 31

Wolff v. McDonnell, 418 U.S. 539 (1974). ..... *passim*

Wright v. West, 505 U.S. 277 (1992). 37

Younger v. Harris, 401 U.S. 37 (1971). 38

STATUTES AND REGULATIONS:

28 U.S.C. § 1738 ..... 9, 27, 36

28 U.S.C. § 2254 8

28 U.S.C. § 2254(b) 26

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1997 ..... 41, 42, 43, 44

42 U.S.C. § 1997e(a)(b) 42, 44

Fed. R. Civ. P. 15(a) 31

Fed. R. Civ. P. 23(c)(2)(A) 17

TABLE OF AUTHORITIES – Continued

Page

Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 101(a) [§§ 801-810], 110 STAT 1321 (1996) 41, 42, 43, 44, 45

Wash. Admin. Code § 137-28-160 ..... 1, 12

Wash. Admin. Code § 137-28-350 12

Wash. Rev. Code § 9.94A.150(1) 12

Wash. Rev. Code § 9.95.080 12

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. XIV, § 1 4

MISCELLANEOUS:

141 Cong. Rec. S7498-01, S7524-27 (May 25, 1995) 43

141 Cong. Rec. S10876-02, S10895-96 (July 28, 1995) 43

141 Cong. Rec. S14611-01, S14611-29 (September 29, 1995) 43

141 Cong. Rec. S18295-02, S18295-96 (December 8, 1995) 43

American Heritage Dictionary of the English Language (Houghton Mifflin Company, 3d ed. 1992) 34, 35

H.R. Conf. Rep. No. 96-897, p.9, Pub. L. 96-247, 1980 U.S.C.C.A.N. 787 42

TABLE OF AUTHORITIES – Continued

Page

Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417 (1993) 21, 22, 46

Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 De Paul L. Rev. 85, 154-157 (1988) 19, 20

Michael Weinman, Note, *To Stay or Not to Stay: Choosing A Procedural Course For Prisoners' Suits Stating Claims Under Both Section 1983 And Habeas Corpus*, 21 Mem.St. U. L. Rev. 733 (1991) 27, 39

Sol Wachtler, *The Prison Odyssey of Sol Wachtler*, N.Y. Times, March 10, 1996, § 4 at 1 48

Statement of Daniel E. Lungren, Attorney General of California, 1995 WL 18450 (F.D.C.H.), p.9 (January 19, 1995) 43

I. STATEMENT OF THE CASE

Respondent, Jerry Balisok, was improperly deprived of his qualified constitutional right to present witnesses at a prison hearing in which he was sanctioned by the revocation of thirty (30) days of earned good-time credits.[1]

Mr. Balisok alleges that Washington State Penitentiary ("WSP") officials date-stamp witness statements received in conjunction with prison disciplinary hearings.[2] Pet. App. I-4. However, in a punitive measure against "jail house attorneys"[3] involved in disciplinary hearings, WSP corrections officers have an unwritten policy and practice of not date-stamping the witness statements for those hearings. *Id.* at I-4. This practice permits corrections officers to conceal witness statements while claiming that the statement was received late, or not at all. *Id.* at I-4. This pattern and practice, which does not serve any legitimate institutional interest or objective, led to Mr. Balisok's § 1983 claim.

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[1] Petitioners admit that Respondent Balisok has a liberty interest in his earned good-time credits. *See* Wash. Admin. Code § 137-28-160 (1996); Pet. Br. 5, n.2.

[2] The allegations in Mr. Balisok's Amended Complaint are accepted as true on review of a Motion to Dismiss. "Because the decision we review adjudicated a motion to dismiss, we accept all of the factual allegations in petitioners' complaint as true. . . . " *Berkovitz v. United States*, 486 U.S. 531, 540 (1988); *Mireles v. Waco*, 502 U.S. 9, 11 (1991); *Lewis v. Casey*, 64 U.S.L.W. 4587, 1996 WL 340797, *8 (1996).

[3] During the proceedings below, it was judicially noted that Mr. Balisok is known as a "jail house attorney." Pet. App. F-3.

On August 4, 1993, Mr. Balisok was alleged to have violated the prison disciplinary code. Pet. App. I-3. He was moved into administrative segregation. *Id.* Following an investigation, he was charged with four violations of that code. *Id.* at I-3. Later that same day, Balisok was notified that a disciplinary hearing would be conducted on September 2, 1993. *Id.* In preparation for his defense, Mr. Balisok asked the hearing officer, Petitioner Gary Edwards, to obtain a witness statement from inmate John Stein, and to submit questions to inmates Harris and Pulley. *Id.* at I-3, I-5.

At the disciplinary hearing, Edwards told Mr. Balisok that inmate Stein did not submit a witness statement, and that inmates Harris and Pulley had refused to respond to the questions. Pet. App. I-4, I-5. This was not true. *Id.* at I-4, I-6. At the same hearing, Mr. Balisok was found guilty. *Id.* at I-6. The prison disciplinary hearing based its decision on: 1) documentary evidence from an investigation; 2) testimony presented at the hearing; and 3) a written report by a Custody Unit Supervisor. Pet. App. K-1 to K-3. Mr. Balisok was sanctioned with ten days of isolation, twenty days of segregation, and the revocation of thirty days of good time. *Id.* at K-3.

Mr. Balisok timely pursued his administrative remedies. He submitted an appeal to the Superintendent, Petitioner Tana Wood, which was rejected as being too long. Pet. App. I-7. Mr. Balisok resubmitted his appeal, along with a letter of explanation. *Id.* This appeal was ignored by prison officials. *Id.* at I-8. Mr. Balisok then filed a grievance alleging that his sanctions were about to

be imposed while his appeal was still pending. *Id.* Petitioner Edwards summarily dismissed that appeal without notice to Petitioner, Superintendent Wood. *Id.* at I-8.

After completing the sanctions imposed, Mr. Balisok was permitted to review his central file. Pet. App. I-4. In that file, Mr. Balisok found all three witness statements dated prior to the hearing. *Id.* at I-4 to I-6. None of these statements had been date-stamped in conformance with the usual prison policy. *Id.* at I-4. Mr. Balisok's Amended Complaint alleges that pursuant to an unlawful policy, Petitioner Edwards intentionally denied Mr. Balisok the right to present this evidence in his defense. *Id.* at I-9.

On October 19, 1993, Mr. Balisok petitioned Superintendent Wood for the opportunity to appeal. Pet. App. I-8. Petitioner Wood responded in a Superintendent Memorandum that the disciplinary ruling and sanctions would stand without any explanation to support her denial of the appeal. *Id.* This deprived Mr. Balisok of a record that would be necessary for a judicial review of the administrative proceedings. *Id.* at I-9, I-10. The final denial of review also exhausted Mr. Balisok's administrative remedies.

II. PROCEEDINGS BELOW

On December 10, 1993, Mr. Balisok filed a *pro se* § 1983 Complaint in the United States District Court for the Eastern District of Washington. Pet. App. at H-1. This Complaint was filed against Petitioners Edwards and

Wood under 42 U.S.C. § 1983 (1979)[4] for violation of Mr. Balisok's right to due process under the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV, § 1; Pet. App. H-1, H-2.

Petitioners filed a Motion for a Stay of Proceedings on March 28, 1994. District Court Docket Entry (hereinafter "D.E.") 12. The District Court ordered Defendants' Motion stayed, pending this Court's decision in *Heck v. Humphrey*, 114 S.Ct. 2364 (1994). Pet. App. E-1, E-2. Following the decision in *Heck*, Petitioners Edwards and Wood filed a Motion to Dismiss on August 19, 1994. D.E. 33.

Counsel was appointed to represent Mr. Balisok on September 12, 1994. D.E. 37. On October 28, 1994, along with a Memorandum in Response to Defendants' Motion to Dismiss, counsel for Mr. Balisok filed an Amended Complaint. D.E. 39; Pet. App. at I. The Amended Complaint cured the deficiencies in Mr. Balisok's *pro se* Complaint and conformed the Complaint to the requirements of *Heck*.[5] *Id.* at I. The Amended Complaint superseded

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[4] 42 U.S.C. § 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . "

[5] Petitioners' Question Presented implies that there is disagreement as to whether the *Heck* decision extends to prison disciplinary hearings. Respondent has never argued that the *Heck* analysis should not be the basis of the determination of Mr. Balisok's case. The rulings of the District Court (Pet. App. F) and the Ninth Circuit below (Pet. App. A) both applied *Heck* as the controlling law. The issue in this case has always been whether a successful determination of Mr. Balisok's Amended Complaint would necessarily imply the invalidity of his prison hearing result and sanctions under the *Heck* analysis.

and nullified the original Complaint and primarily seeks declaratory and injunctive relief, along with damages, for a policy and practice of due process violations. *Id.* at I-2, I-10.

On February 6, 1995, the District Court entered an Order Denying Defendants' Motion to Dismiss, and stayed Mr. Balisok's Complaint. Pet. App. F-1. The District Court reasoned that a stay was required because a finding that the disciplinary procedures violated due process would also require the restoration of good-time credits. Pet. App. F-11, F-12. The District Court did not consider Washington State's adherence to the "some or any evidence" standard with regard to prison disciplinary hearings.[6] The District Court also incorrectly characterized Balisok's Complaint as seeking damages for the loss of good time. *Id.* at F-12. The District Court certified the case for immediate appeal to the United States Court of Appeals for the Ninth Circuit. *Id.* at F-15. On November 22, 1995, the Ninth Circuit reversed and remanded.

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[6] *In re Burton*, 80 Wash. App. 573, 910 P.2d 1295 (1996), rev. denied ___ Wash. 2d ___ (1996); *Petition of Anderson*, 112 Wash. 2d 546, 772 P.2d 510 (1989), cert. denied, *Anderson v. Washington*, 493 U.S. 1004 (1989); *Petition of Johnston*, 109 Wash. 2d 493, 745 P.2d 864 (1987); *In re Reismiller*, 101 Wash. 2d 291, 678 P.2d 323 (1984); *but cf. Bourgeois v. Murphy*, 119 Idaho 611, 809 P.2d 472 (1991).

Pet. App. A-2. The Ninth Circuit, applying *Heck v. Humphrey*, concluded that Mr. Balisok's challenge to the procedure by which he was denied good-time credits did not necessarily imply the invalidity of his continuing confinement and therefore was not barred. Pet. App. A-2. Because of the Motions to Dismiss and Request for Stays filed by Petitioners, no formal discovery has been conducted or permitted in this case.

This Court granted Mr. Balisok's motion to proceed *in forma pauperis* and granted certiorari on April 29, 1996.

III. SUMMARY OF ARGUMENT

A. Prisoners in state custody have the right under 42 U.S.C. § 1983 to challenge unconstitutional practices and conditions of a state prison system so long as the lawsuit does not necessarily imply the invalidity of a prison disciplinary hearing result or length of confinement. *Heck v. Humphrey*, 114 S.Ct. 2364 (1994). Respondent, Jerry Balisok, filed an Amended Complaint against state officials seeking declaratory relief, injunctive relief, and damages for the unconstitutional practice of denying "jail house attorneys" access to collected witness statements. Mr. Balisok's Amended Complaint limits his claims to unconstitutional procedures and falls precisely within the permissible boundaries of *Heck v. Humphrey*. The *Heck* decision recognized the importance of permitting § 1983 claims for procedural due process violations when it reaffirmed *Wolff v. McDonnell*, 418 U.S. 539 (1974).

B. In *Wolff v. McDonnell*, lower courts were instructed to determine the validity of procedures for revoking good-time credits and to fashion appropriate

remedies for any constitutional violations, short of ordering the actual restoration of lost good-time credits. *Wolff*, at 555. Mr. Balisok's Amended Complaint seeks only relief for the procedural due process violations suffered as part of the prison procedures used in the revocation of his earned good-time. Nowhere in his Amended Complaint can allegations be found attacking the disciplinary hearing result or sanctions. Mr. Balisok's Amended Complaint seeks only determination of, and relief for, procedural conduct impermissible under *Heck* and *Wolff*.

C. A finding in Mr. Balisok's favor on all of the allegations in his § 1983 Complaint will not necessarily imply the invalidity of his prison disciplinary hearing result or sanctions. Washington courts follow the "some or any evidence" standard when reviewing prison disciplinary hearings. Under this standard, if there is any evidence in the record to support the prison hearing determination, then the court will not undertake an entire review of the record and will uphold prison hearing results. *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445 (1985). Mr. Balisok's prison disciplinary hearing record shows independent sources of evidence that the hearing officer used to support his determination. Mr. Balisok has never asked the state courts to review his hearing result or sanctions. However, since Mr. Balisok's Amended Complaint only attacks procedure, a ruling in Mr. Balisok's favor under § 1983 would not require or even imply that his hearing or sanctions should be reversed by a state court.

D. A favorable district court determination of a prisoner § 1983 suit for procedural due process violations

will not preclude a state court from arriving at an independent determination of the related issues under habeas corpus law. Under 28 U.S.C. § 2254, the preclusion doctrine will not apply to a state habeas corpus hearing if its application prevents the state court from accomplishing an independent habeas corpus review. *Heck*, 114 S.Ct. at 2372 n.9.

E. The common law of torts and specifically the malicious prosecution analogy cited in *Heck* is inapplicable in a § 1983 challenge to procedural due process only. The § 1983 Complaint filed by Mr. Balisok is solely about violations of due process procedure. The proper analogous case is *Carey v. Piphus*, 435 U.S. 247 (1978). *Carey* and its progeny recognize that an administrative hearing which can result in the loss of a constitutional interest invokes an absolute right in procedural due process even if the hearing result was correct.

F. It is hornbook law that an amended complaint supersedes and nullifies the original complaint unless the amended complaint specifically incorporates by reference allegations of the original complaint. Mr. Balisok's Amended Complaint does not incorporate directly or by inference any of the allegations of the original Complaint. Petitioners have mistakenly supported their argument with citations to the irrelevant original Complaint and associated pleadings. Mr. Balisok's Amended Complaint is the only cognizable Complaint in this case, and it properly sets forth a claim under § 1983 for violations of procedural due process.

G.1. Petitioners propose a new rule for this Court to adopt in prison disciplinary hearings which would

require the overruling of *Heck v. Humphrey* and *Wolff v. McDonnell*. There is no apparent need for this new rule since the test set out in *Heck* is clear, unambiguous, and easy for lower courts to apply. The only purpose for the new rule offered by Petitioners is to create a judicial barrier to the federal forum that Congress has made available to prisoners under § 1983.

G.2. Federal courts under 28 U.S.C. § 1738 are required to give preclusive effect to issues decided by state courts. The effect of adopting Petitioners' proposed rule would be to preclude federal court review of legitimate constitutional violations. Likewise, crafting an abstention doctrine to § 1983 claims would have the same effect of denying state prisoners access to a federal court for constitutional violations in state prisons. The Petitioners' proposed rule should be rejected because it is a vague, overly broad, and unworkable rule which, by virtue of the preclusion doctrine, eradicates an important federal remedy.

G.3. Allowing prisoners to go forward with § 1983 claims will not interfere with prison administration or the independent functioning of state courts. Mr. Balisok is simply asking the District Court to find that a practice of lying and cover-ups by prison officials, which denies prisoners the right to present witnesses, is wrong. Mr. Balisok's allegations do not encroach on legitimate prison discipline or administration issues. The proper solution in due process cases such as this one is to require prison officials to afford inmates the qualified due process rights the inmates still possess.

H. This Court has held that exhaustion requirements should not be judicially imposed upon § 1983 claims. *Patsy v. Board of Regents*, 457 U.S. 469 (1982). Congress is the proper body to restrict prisoner access to federal court. It has responded to State concerns and exercised its legislative prerogative recently with the Prison Litigation Reform Act of 1995. This Court should refrain from imposing any additional judicial restrictions in light of Congress's recent amendments affecting prisoner § 1983 cases.

I. 42 U.S.C. § 1983 recognizes the important and fundamental right of the federal government to preserve the basic rights and liberties embodied in the United States Constitution. Petitioners and State Amici repeatedly refer to federal-state comity in their effort to persuade this Court to impose a broad rule effectively denying § 1983 claims for prisoners suffering due process violations. This argument ignores the basic fact that some federal-state conflict is inherent in § 1983. The occasions for abuse of due process in the prison setting are numerous and the federal courts must have the opportunity to protect the limited and qualified constitutional rights remaining with state prisoners.

Accordingly, the judgment of the Ninth Circuit Court of Appeals should be affirmed and Mr. Balisok should be permitted to proceed in federal court with his § 1983 claim for violations of procedural due process.

IV. ARGUMENT

A. Mr. Balisok's § 1983 Complaint is the Type of Lawsuit Permitted by This Court's Ruling in Heck v. Humphrey.

In *Heck v. Humphrey*, 114 S.Ct. 2364 (1994), this Court held that a § 1983 claim which would not necessarily imply the invalidity of a conviction should be allowed to proceed. 114 S.Ct. at 2372. The Court stated that a claim for using the wrong procedures, rather than one for reaching the wrong result, could be just such a claim. *Id.* at 2370 (reaffirming *Wolff v. McDonnell*, 418 U.S. 539 (1974)).

Mr. Balisok's § 1983 Amended Complaint alleges that WSP officials engage in an ongoing pattern of conduct, that of not date-stamping witness statements for "jail house attorneys." Pet. App. I-4, I-9. This practice deprives those prisoners of their qualified due process right to introduce witness statements in their defense at prison disciplinary hearings. This pattern and practice led to the constitutional deprivation for which Mr. Balisok has filed suit.[7]

His prison disciplinary hearing resulted in a loss of thirty days earned good-time credit. While Mr. Balisok cannot challenge the loss of his good-time credits in this

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[7] Mr. Balisok, a "jail house attorney," has a stake in the outcome of this case because the violation of his civil rights from the procedures alleged in his § 1983 Amended Complaint is likely to recur. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *See also Farmer v. Brennan*, 511 U.S. 825 (1994). Mr. Balisok's 240-month sentence began in September of 1989. Pet. Br. at 2.

proceeding, the liberty interest associated with his earned good-time credits does permit a § 1983 claim for the procedural due process violation.[8]

Mr. Balisok's Amended Complaint also alleges that Superintendent Wood summarily dismissed Mr. Balisok's appeal without stating any basis for her decision. Pet. App. I-8. A stated basis is required when a prisoner is deprived of a liberty interest protected under the Fourteenth Amendment. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974). This is to prevent arbitrary and capricious conduct by prison officials, and to enable a reviewing court to properly assess whether due process was accorded. *Wolff*,

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[8] Petitioners concede that there is a liberty interest in earned good time (Pet. Br. 5 n.1) because inmates of the Washington State Department of Corrections (DOC) have a statutorily created right to earn good time for good behavior and good performance. Wash. Rev. Code § 9.94A.150(1) (1996); *Petition of Fogle*, 128 Wash. 2d 56, 59, 904 P.2d 722, 724 (1995). Once good time has accrued to an inmate, it may be revoked or reduced upon a finding that the inmate has committed a serious infraction. Wash. Admin. Code § 137-28-160 (1996). However, because earned good time represents a liberty interest, the correctional facility is required to provide the qualified due process accorded to prisoners under both *Wolff v. McDonnell* and the relevant Washington State Codes before revocation or reduction. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); Wash. Rev. Code § 9.95.080 (1996); Wash. Admin. Code § 137-28-350 (1996). In *Sandin v. Conner*, this Court reaffirmed the *Wolff* liberty interest principles. *Sandin v. Conner*, 115 S.Ct. 2293, 2300 (1995). The Ninth Circuit has found Washington's good-time scheme to be indistinguishable from "Nebraska's good conduct time credit system, which the Supreme Court in *Wolff v. McDonnell* found to confer a liberty interest on inmates." *Gotcher v. Wood*, 66 F.3d 1097, 1100 (9th Cir. 1995).

at 564; *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445, 454 (1985).[9]

Mr. Balisok's Amended Complaint seeks only a declaration that his procedural due process rights were violated, injunctive relief to prevent this type of conduct in the future, and damages for the violation of those rights. Pet. App. I-10. Mr. Balisok specifically does not challenge the result of the prison disciplinary hearing, or seek damages for that result. He also does not challenge the punishment assessed in that hearing, or the results of his appeal. *Id.* at I-9, I-10. Therefore, a successful § 1983 claim in this case will not demonstrate the invalidity of Mr. Balisok's disciplinary hearing or sanctions.

In *Heck v. Humphrey*, 114 S.Ct. 2364 (1994), the Court considered whether a state prisoner could challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983. *Heck*, 114 S.Ct. at 2368. Unlike Mr. Balisok, the prisoner in *Heck* never timely challenged "the description of his monetary claims (by both the District Court and the Court of Appeals) as challenging the legality of his conviction." *Id.* at 2369 n.2. Mr. Balisok does not challenge the legality of his conviction in his Amended Complaint and has repeatedly objected to such a characterization by the petitioners and the District Court. Pet. App. I; D.E. 39, 53.

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[9] These due process rules are necessary to minimize substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected liberty interests. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

Heck directly addresses the issue of Mr. Balisok's § 1983 Amended Complaint:

> In light of the earlier language characterizing the claim as one of "damages for the deprivation of civil rights," rather than damages for the deprivation of good-time credits, we think this passage [in *Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (i.e., denying good-time credits). . . . Thus, the claim at issue in *Wolff* did not call into question the lawfulness of the plaintiff's continuing confinement.

114 S.Ct. at 2370 (citations omitted).

Mr. Balisok's challenge to the witness statement date-stamping procedures, which are unconstitutional and deprive him and other "jail house attorneys" of civil rights, is exactly the type of challenge approved in *Heck*. His Amended Complaint does not challenge the fact of his conviction, the lawfulness of his continuing confinement, or his loss of good time, but seeks only declaratory relief, injunctive relief, and damages for the ongoing violations of procedural due process.

In *Heck*, this Court set forth the test the lower courts must use when analyzing a prisoner § 1983 claim:

> Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether the judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if

> successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 2372 (footnotes omitted).

Applying the *Heck* test to the Amended Complaint filed by Mr. Balisok shows that success in his § 1983 action will not demonstrate the invalidity of any outstanding disciplinary hearing or loss of good time.

Justice Scalia gave two examples to assist lower courts when deciding these very issues. 114 S.Ct. at 2373 nn.6-7. A § 1983 suit for violation of the Fourth Amendment right to be free from unlawful arrest has to negate an element of a conviction for resisting arrest in order to be successful. *Id.* at 2373 n.6. This type of § 1983 suit is therefore not allowed under *Heck*.

To illustrate the type of § 1983 suit which would be allowed under *Heck*, the Court stated:

> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery . . . , and especially harmless error . . . , such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

Heck, 114 S.Ct. at 2373 n.7 (citations omitted).

Mr. Balisok's Amended Complaint epitomizes this Court's example in footnote 7. Proper application of the

Heck test requires a three-step analysis by the District Court. First, does the nature of Mr. Balisok's Complaint attack the validity of the prison hearing result or sanction? No. It only attacks an unconstitutional procedure used against "jail house attorneys" which is not an element of the offense. Second, will the state court be compelled to reverse the result or sanctions arising from Mr. Balisok's disciplinary hearing based on the District Court's ruling? No. Washington's use of the "some or any evidence" standard insulates the hearing result and sanctions from most procedural attacks.[10] *See* section C, *infra*. Third, does the relief requested challenge or contradict the validity of the prison hearing result or sanctions? No. Mr. Balisok is not seeking any damages for the result of the hearing or the sanctions, only relief for the procedural due process violations.

When each part of this three-step analysis is answered in the negative, then a decision in a § 1983 prisoner claim will not necessarily imply the invalidity of the prison disciplinary hearing or sanctions and should be allowed to proceed in District Court.

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[10] Other examples of this would be independent source, inevitable discovery, and harmless error as recognized in footnote 7 of *Heck*. *Id.* at 2373 n.7. Petitioners cite to *Elkin v. Fauver*, 969 F.2d 48 (3d Cir. 1992), in order to advance their argument that Balisok's claims would not be subject to harmless error. Pet. Br. 30 n.21. *Elkin* is inapposite since in that case the court had been vacating sanctions that resulted from the prison administration's repeated intentional violations of a court-ordered consent decree.

B. Mr. Balisok's § 1983 Complaint is Precisely the Type of Procedural Due Process Challenge that is Permitted Under Wolff.

Wolff v. McDonnell is the leading Supreme Court case to address directly the type of facts surrounding Mr. Balisok's claims. 418 U.S. 539 (1974). *Wolff* involved a class action brought by prisoners alleging that the rules, practices, and procedures at the prison, which might result in the taking of good time, violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 542-43. Prisoners sought three types of relief: (1) restoration of good time; (2) submission of a plan by the prison authorities for a hearing procedure in connection with the withholding and forfeiture of good time which complied with the requirements of due process; and (3) damages for the deprivation of civil rights resulting from the use of allegedly unconstitutional procedures.[11] *Id.* at 553.

In *Wolff*, the Court citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973), affirmed that a § 1983 lawsuit is the proper vehicle for prisoner damages claims. 418 U.S. at 554. The

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[11] Petitioners argue that procedural due process claims are limited to class-action cases. Pet. Br. 33. It is hard to imagine exactly what petitioners are claiming since a class action is simply an efficient way to handle identical or related individual claims. Class actions even permit an opt-out by individual claimants. Fed. R. Civ. P. 23(c)(2)(A). Furthermore, the test Petitioners cite with approval as assuring the legitimacy of claims in class certification is identical to the test district courts apply to individual prisoner claims. Pet. Br. 33-34. If district courts have the ability to determine the legitimacy of class-action claims, they certainly have the same ability in individual claims.

decision in *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings.[12] *Wolff*, 418 U.S. at 554.

> We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled.

418 U.S. at 555 n.13.

Mr. Balisok's claims fall squarely within this permitted area. Specifically with regard to the right of a prisoner to call a witness (or present a witness statement) in his defense at a disciplinary hearing, the *Wolff* Court said: "We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id.* at 566.

In Mr. Balisok's case, there is no legitimate institutional or correctional basis for denying "jail house attorneys" access to prisoner statements that have already been prepared and collected. It is simply a scheme to

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[12] In this regard *Preiser's* basic holding remains unchallenged and supports Mr. Balisok's right to bring his § 1983 claim. *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973).

subvert the qualified due process rights retained by prisoners. The *Wolff* Court was concerned about subversion of prisoner rights when it stated: "Although we do not prescribe it, it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases." 418 U.S. at 566.

Mr. Balisok's allegations present this Court with the type of official conduct the *Wolff* Court sought to prevent. The record does not set forth a reason for refusing to provide Mr. Balisok access to the witness statements collected by the prison officials. Petitioner Edwards told Mr. Balisok that the statements were not returned by the prisoners. Mr. Balisok alleges that Petitioner Edwards' statement was false. Pet. App. I-4, I-6. Mr. Balisok seeks a declaration that such conduct is unconstitutional. He also seeks an injunction to prevent the conduct from recurring in the future and damages for the deprivation of his qualified due process rights. *Id.* at I-10. This is exactly the type of claim allowed in *Wolff*, as reaffirmed by *Heck*. *Heck*, 114 S.Ct. at 2370.

When a prisoner lawsuit is limited to a procedural due process issue and the relief requested is associated only with the procedural due process claim, the lawsuit does not infringe on the area in which habeas corpus is the exclusive remedy. Professor Schwartz recognized this in his extensive article about the habeas/§ 1983 dichotomy:

> [T]he Supreme Court's . . . decisions in *Wolff v. McDonnell* and *Gerstein v. Pugh* provide substantial, if not conclusive, support for the proposition that procedural due process claims that do

> not seek immediate or speedier release from prison may be asserted under section 1983.
>
> . . .
>
> Prisoner claims that contest the absence or the sufficiency of the standards used by prison officials in making determinations, challenge the manner in which those determinations are made and, if successful, do not automatically terminate or shorten the length of confinement. Most courts, therefore, properly treat these claims as procedural due process claims that may be asserted under § 1983.

Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 De Paul L. Rev. 85, 155-157 (1988) (citations omitted).

Professor Schwartz also addressed the minority of courts which have held that a due process challenge to procedure alone should be barred and habeas corpus held to be the exclusive remedy:

> This view, however, misses the essential points: (1) that a prisoner who seeks procedural protections is not asking for immediate or speedier release; and (2) that the adjudication of the sufficiency of the procedural due process requirements does not attack the constitutionality of a prisoner's confinement.

Id. at 157 (citations omitted).

It cannot be disputed that the allegations raised in Mr. Balisok's Amended Complaint amount to illegitimate actions of prison officials concerning a due process right. However, since his claims do not attack his continuing

confinement, Mr. Balisok's Amended Complaint is exactly the type of narrowly drawn procedural due process claim permitted under *Wolff* and *Heck*.

C. Finding that Mr. Balisok was Deprived of Procedural Due Process Would Not Necessarily Imply the Invalidity of His Disciplinary Hearing Result.

If Mr. Balisok succeeds in showing that his qualified due process rights were violated in a successful § 1983 action, a state court will not be required to reverse Mr. Balisok's hearing determination. Washington law applies the "some or any evidence" standard to the review of prison disciplinary hearings, and has done so consistently since *In re Reismiller* was decided in 1984. *In re Reismiller*, 101 Wash. 2d 291, 678 P.2d 323 (1984) (en banc); *see also In re Hunter*, 43 Wash. App. 174, 715 P.2d 1146 (1986); *Petition of Johnston*, 109 Wash. 2d 493, 745 P.2d 864 (1987); *Petition of Anderson*, 112 Wash. 2d 546, 772 P.2d 510 (1989), cert. denied, *Anderson v. Washington*, 493 U.S. 1004 (1989); *In re Burton*, 80 Wash. App. 573, 587, 910 P.2d 1295, 1305 (1996), rev. denied, ___ Wash. 2d ___ (1996). Under the "some or any evidence" standard, if there is any evidence in the record to support the prison hearing determination then the court will uphold the decision. *See* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417, 433-34 (1993).

> Once a prisoner has been found guilty of a disciplinary violation, a reviewing court cannot reweigh the evidence considered by the prison

> administrators. Rather, the imposition of discipline will be upheld if supported by "some evidence." . . . [T]he relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. This is the most deferential standard of review under which the factual determination of the prison administrators will be upheld in the very large majority of situations.

Id. at 433-34 (citations omitted).

The record of Mr. Balisok's hearing shows that the determination was made on the basis of the documentary evidence from an investigation, testimony presented at the hearing, and a written report by a Custody Unit Supervisor. Pet. App. K-1, K-3, L-1, L-4. With this evidence, Mr. Balisok's hearing results will not necessarily be reversed nor will his good-time credits necessarily be restored by a state court based on a finding of a due process violation.

Petitioners cite *Reismiller* to support their contention that a § 1983 finding in Mr. Balisok's favor would dictate reversal of his disciplinary hearing outcome. Pet. Br. 31. To the contrary, *Reismiller* stands for the proposition that the arbitrary and capricious standard of review, used in reviewing prison disciplinary proceedings, turns not on the "sufficiency of the evidence but on whether any proper evidence at all was presented." 101 Wash. 2d at 296, 678 P.2d at 326. "Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." *Id.* In *Reismiller*, the disciplinary hearing was set aside because the court found that there was no

evidence in the record which linked Reismiller with the infraction. *Id.* at 297, 678 P.2d at 326. In Mr. Balisok's case, there is "some or any evidence" that the state court on independent review could use to uphold the hearing result and sanction. Pet. App. K-2.

Similarly, Petitioners cite *Hunter* implying that the holding demonstrates that Mr. Balisok's hearing would necessarily be reversed. *Hunter*, 43 Wash. App. 174, 715 P.2d 1146 (1986); Pet. Br. 31. However, in *Hunter*, the disciplinary hearing determination was reversed because the court found that the State's characterization of "the evidence as 'meager' [was] generous . . . . There was no evidence taken at either hearing." *Hunter*, at 177, 715 P.2d at 1147. Evidence was taken at Mr. Balisok's hearing and therefore this case does not support Petitioners' contention.[13]

Other Washington cases firmly establish the "some or any evidence" rule. In *Anderson*, the plaintiff argued that the finding of the disciplinary hearing did not even meet the "some or any evidence" standard of due process, because there was no direct evidence connecting him with the infraction. *Anderson*, 112 Wash. 2d at 549, 772 P.2d at 512. In spite of this, the court used the doctrine of

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[13] The facts of each case are as important to understanding the case's holding and relevance as are quotes taken from the case to support a different set of facts before the court. "The language of a decision is used to explain why the particular result follows from the concrete facts of the case, and must be read with reference to the dispute before the court in that case. Karl N. Llewellyn, *The Bramble Bush 36* (1930). Mining decisions for quotations out of context does not amount to an argument." *United States v. Herron*, 45 F.3d 340, 342 (9th Cir. 1995).

"constructive possession," and upheld a determination of Anderson's guilt that was based on the fact that contraband was found in a cell that he shared with three other inmates. *Id.* at 549-552, 772 P.2d at 512-513. In *Burton*, despite the prisoner's contention that the hearing did not meet the "some or any evidence" standard, and a showing of procedural "irregularities," the disciplinary hearing was not overturned. *Burton*, 80 Wash. App. at 598, 910 P.2d at 1306. The court reaffirmed the "some or any evidence" standard used in Washington and also by this Court in *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445 (1985), to support its conclusion:

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. We decline to adopt a more stringent evidentiary standard as a constitutional requirement. *Johnston*, 109 Wash. 2d at 497, 745 P.2d 864 (quoting *Hill*, 472 U.S. at 453, 105 S.Ct. at 2772-73). A prison disciplinary hearing is arbitrary and capricious only if no evidence supports the action taken. *Anderson*, 112 Wash. 2d at 549, 772 P.2d 510.

In re Burton, at 587-88, 910 P.2d at 1305-06.

All of these cases show that under Washington law, a disciplinary hearing will not be reversed if there is "some or any evidence" in the record to support the finding of

the disciplinary board. The "some or any evidence" standard was recognized and adopted by this Court in *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. at 454 (1985). In *Hill*, this Court characterized the evidence as "meager," but, nonetheless, found it to be constitutionally sufficient under the peculiar circumstances of a prison.[14] *Id.* at 457. This Court gives great deference to the exigencies of prison administration by permitting a much lower standard of due process with regard to prison disciplinary hearings. *Id.* at 555-56.

Mr. Balisok claims he was denied access to witness statements. Assuming the witness statements contain information suggesting Mr. Balisok was not guilty of the prison infraction, they would present, at most, a second opinion or view as to his guilt or innocence. However, the fact that there exist two opinions which may offer conflicting evidence is insufficient to reverse a prison hearing determination. Despite petitioners' efforts to convince this Court otherwise, Washington case law does not support Petitioners' contention that Mr. Balisok's disciplinary hearing would have to be reversed by a state court if he wins his § 1983 claim. A Washington court will be free to look at all of the evidence and come to an independent result based on state law.

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[14] *Hill* also demonstrates that Petitioners' argument that federal law will somehow require the state court to reverse the prison disciplinary hearing result fails as well. Pet. Br. 30-31.

D. Finding That Mr. Balisok Was Deprived of Procedural Due Process Would Not Preclude the State Court From Conducting an Independent Review in a Habeas Corpus Challenge.

Petitioners and State Amici argue that a successful § 1983 claim may, because of preclusion, dictate the outcome of subsequent litigation in state court. Pet. Br. 28-29; Brief of States' Amici Curiae, ("State Am. Br.") 16. They use this argument to support their contention that these types of claims must be considered only as habeas corpus claims, which would thus be subject to state court exhaustion requirements. However, state courts do not have to follow or adopt the district court findings from a § 1983 case. *Heck*, 114 S.Ct. at 2373.

A favorable district court determination of a prisoner § 1983 suit for procedural due process violations will not preclude a state court from arriving at an independent determination of the related issues under habeas corpus law. The federal court will not be ruling on the sufficiency of the evidence presented at the disciplinary hearing. Only the state court makes this determination. Federal law requires that a prisoner exhaust state remedies before filing a federal habeas corpus complaint. 28 U.S.C. § 2254(b). As stated in *Heck*, 28 U.S.C. § 2254(b) expressly authorizes a state court to conduct an independent determination, even if the same issues or facts were litigated in a § 1983 claim. *Heck*, 114 S.Ct. at 2373. If the § 1983 judgment conflicts with the independent § 2254(b) state review, preclusion may not even be "a permissible effect." *Id.* at 2373.

The basis for the state's right to reach an independent conclusion in a habeas corpus case was recently discussed:

> No federal authority, however, requires state courts to give federal decisions a preclusive effect. The full faith and credit clause of the United States Constitution requires only that state courts give the judgments of a sister state the same preclusive effect that the rendering state would give it. The full faith and credit statute, 28 U.S.C. section 1738, speaks only to the federal courts. A state could adopt an approach that would allow it to ignore a federal court's decision in a section 1983 claim. This would give the state court the first opportunity to correct the errors in the administration of its prisons, while also protecting the prisoners' section 1983 right of a federal forum to redress deprivations of federal rights.

Michael Weinman, Note, *To Stay or Not to Stay: Choosing A Procedural Course For Prisoners' Suits Stating Claims Under Both Section 1983 And Habeas Corpus*, 21 Mem.St. U. L. Rev. 733, 753-54 (1991).

The issue preclusion argument of Petitioners and State Amici should be rejected now, just as it was in *Heck*. 114 S.Ct. at 2373.

E. A § 1983 Lawsuit That Does Not Implicate the Prison Hearing Result or Sanction Requires No Prior Successful Challenge.

Petitioners' argument that a prisoner should be required to obtain reversal of the results of a hearing

before challenging unconstitutional procedures is not supported by analogy to tort law or § 1983 itself. Unlike a malicious prosecution claim and the claim at issue in *Heck*, a claim that prison procedures violate the Due Process Clause does not directly challenge the merits of the decision in the proceeding. *Wolff*, 418 U.S. at 554. For example, a prisoner may prevail by showing that the procedures violate due process and is not required to also show that the violations are so severe that the court should reverse the decision on the merits. *Wolff*, 418 U.S. at 554.

Moreover, requiring that the merits of the decision be overturned as a prerequisite to challenging unlawful procedures would effectively foreclose many actions, despite the damage inflicted by such unlawful procedures. For example, if a prisoner is released from custody shortly after the prison disciplinary proceeding or during the pendency of a suit, the prisoner will not be able to pursue a habeas challenge to overturn the results because the prisoner would not be in custody for habeas corpus purposes.[15] *See Gotcher v. Woods*, 66 F.3d 1097 (9th Cir. 1995); *Heck*, 114 S.Ct. at 2379 (Souter, J., concurring). Consequently, under Petitioners' theory, the ongoing due process violations would be immune from review and an action for damages would be foreclosed.

The distinction this type of case presents was addressed in *Carey v. Piphus*, 435 U.S. 247 (1978). In *Carey*,

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[15] In this example, the good time cannot be restored through habeas and the remedy becomes damages under § 1983 as in *Gotcher v. Woods*, 66 F.3d 1097 (9th Cir. 1995). *See* ACLU Am. Br. § II.

respondents were high school students who were suspended from school without due process of law in violation of the Fourteenth Amendment. *Id.* at 249. "The complaint sought declaratory and injunctive relief, together with actual and punitive damages in the amount of $3,000.00." *Id.* at 250. This Court "granted certiorari to consider whether, in an action under § 1983 for the deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial 'nonpunitive' damages." 435 U.S. at 253. In addressing this question, the Court affirmed that 1) substantial nonpunitive damages must be supported by proof of actual injury, *id.* at 262; 2) exemplary or punitive damages are available to a plaintiff in a proper case under § 1983, *id.* at 257 n.11; and 3) the right to procedural due process is absolute and a violation of this right always supports an award of damages, even if nominal. *Id.* at 266-67.

The Court specifically addressed the right to damages for violations of procedural due process:

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed . . . , we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

435 U.S. at 266-67 (citations omitted; footnotes omitted).

In *Farrar v. Hobby*, this Court reaffirmed the principles of Carey: "Doubtless, 'the basic purpose of a § 1983 damages award should be to compensate persons for

injuries caused by the deprivation of constitutional rights.' " *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (quoting *Carey*, 435 U.S. at 254).

Mr. Balisok's lawsuit for procedural due process violations alleges conduct that is independent of the results of the prison disciplinary hearing. At trial it will be his burden to prove damages: actual, punitive and/or nominal, as well as evidence sufficient to support his claims for declaratory and injunctive relief. Likewise, his claim for procedural due process violations is absolute and can proceed without proof of a successful challenge to his prison hearing determination.

F. An Amended Complaint Entirely Supersedes the Original Complaint.

Petitioners continually make reference to Mr. Balisok's original Complaint and witness list as if they have some relevance or legal effect that this Court must consider. Pet. Br. *passim*. They make only passing reference to the Amended Complaint that was the subject of the decisions below. Pet. Br. 5, 13, 20. However, it is a "well-established doctrine" that an amended pleading supersedes the original pleading. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Once an amended complaint supersedes the original complaint, the original complaint is thereafter treated as nonexistent. *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967); *Boelens v. Redman Homes*, 759 F.2d 504 (5th Cir. 1985); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987); *Federal National Mortgage Association v. Cobb*, 738 F.Supp. 1220, 1227 (N.D. Ind. 1990). A party's pleadings may be amended once as a matter of course at any

time before a responsive pleading is served. Fed. R. Civ. P. 15(a). In this case, Mr. Balisok's Amended Complaint was filed on October 28, 1994, prior to Petitioners filing an Answer to the *pro se* Complaint. *See* J.A., List of Relevant Docket Entries, pp. 1-2.

Mr. Balisok's Amended Complaint does not incorporate either explicitly, or by reference, any of the allegations in the original Complaint. These allegations were specifically deleted from the Amended Complaint as required by case law and court rules and cannot be considered by the Court.[16] However, since only the original *pro se* Complaint has allegations which could be considered claims requiring exhaustion of state court remedies, the Petitioners have focused on this non-existent Complaint to support their exhaustion arguments.[17] *Cf. Washer v. Bullitt Co.*, 110 U.S. 558, 559 (1884). (A plaintiff cannot be prejudiced by the fact that the claim in the original petition was for a sum less that such would bring the case within the jurisdiction of the court.)

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[16] After the *Heck* decision, the District Court specifically sought out counsel to become Mr. Balisok's attorney in this case. D.E. 37. Once qualified counsel had the opportunity to review the original *pro se* Complaint, the record, and relevant case law, failure to amend Mr. Balisok's *pro se* Complaint to conform to the law as set forth in *Heck*, *Wolff*, and *Preiser* could have been the subject of Rule 11 sanctions and would have been malpractice. *See Bounds v. Smith*, 430 U.S. 817, 825-26 (1977).

[17] By premising their arguments upon Balisok's original Complaint, Petitioners are also asking this Court to deviate from its "normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here." *Cort v. Ash*, 422 U.S. 66, 72 (1975).

Equally irrelevant is Mr. Balisok's *pro se* Witness List filed during proceedings on the original Complaint. J.A. 3. The *pro se* Witness List was superseded and nullified by the filing of the Amended Complaint. This issue was discussed in *Fry v. UAL Corp.*, 895 F.Supp 1018 (N.D. Ill. 1995) where plaintiffs in a securities case sought to use a superseded complaint and a court order based on the superseded complaint to prove that an allegation was properly before the court. *Id.* at 1047-48. The District Court rejected this attempt to use superseded pleadings:

> Thus, to the extent that plaintiffs rely on the Court's, the defendant's, or their own characterizations of the subject matter of this lawsuit prior to the filing of the amended complaint to support their contention that a duty to update claim has been part of this case all along, their efforts are misdirected.

Id. at 1048.

Mr. Balisok must assume that Petitioners attached these documents to the Joint Appendix, and emphasized them in their brief, in the hope that the Court will rely on them. However, they are of no legal relevance and should be ignored.

Petitioners also contend that Mr. Balisok's "reservation of the right to challenge the loss of good-time credits at another time" is further evidence of manipulative pleading and supports their "habeas in disguise" argument. Pet. Br. 21, 29. This ignores the fact that the only way Mr. Balisok could challenge the hearing results and punishment is through a separate claim under habeas

corpus. *See Wolff v. McDonnell*, 418 U.S. at 554. The footnote in Balisok's Memorandum in Response to Defendants' Motion to Dismiss, (D.E. 39, p.5) simply reserves that right. Had Mr. Balisok not reserved his right, then upon the filing of a later habeas corpus petition in state court, the first argument raised by defendants would be waiver.[18]

Because Mr. Balisok has acted in a legally responsible and prudent manner, he is accused of manipulative pleading. Pet. Br. 21. This Court has recognized that it is necessary to liberally construe the *pro se* pleadings of a prisoner and provide them an opportunity to amend to state valid claims whenever possible. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Unfortunately, the Attorneys General of Washington and seventeen other states seek to draw an "iron curtain"[19] between the constitution and the prisoners of this country by characterizing Mr. Balisok as the archetype of the manipulative "jail house attorney."

In determining whether or not Mr. Balisok's Amended Complaint necessarily implies the invalidity of his prison disciplinary hearing, it is the Amended Complaint and subsequent pleadings only that have legal

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[18] As as matter of record, Mr. Balisok has never filed a state court challenge to his 1993 disciplinary hearing result and sanctions.

[19] [A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. *Wolff v. McDonnell*, 418 U.S. 539, 55-56 (1974).

significance, not the superseded original Complaint or superseded pleadings.[20]

G. This Court Should Not Overrule Wolff v. McDonnell and Heck v. Humphrey by Adoption of Petitioners' Proposed Rule.

1. Petitioners' Proposed Rule Is Unworkable.

The principles articulated in *Heck v. Humphrey* provide lower courts with clear guidance for classifying prisoner complaints. In concert with *Wolff*, *Heck* set out a rule that is clear, unambiguous, and easy to apply. *See* Resp. Br. §§ A, B. A § 1983 claim for damages is not cognizable if it necessarily[21] implies the invalidity of the underlying conviction. Lower courts have not had any difficulty applying this test.[22]

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[20] This is hornbook law which should have been brought to this Court's attention in Petitioners' Brief on the Merits. *See Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445, 457-58 (1985) (Stevens, J., concurring in part and dissenting in part).

[21] The key word in the *Heck* test is "necessarily," which is defined as: of necessity; inevitably. Necessary: Absolutely essential; Needed to achieve a certain result or effect; requisite; logically inevitable. Imply: to involve by logical necessity; entail. American Heritage Dictionary of the English Language (Houghton Mifflin Company, 3d ed. 1992).

[22] Petitioners' request to overrule *Heck* implies that the *Heck* test is unworkable and is creating a split among the Circuits. A survey of the Federal Circuits shows unanimity in applying *Heck* to prison disciplinary hearings, parole hearings, and *Bivens* actions. Disciplinary Hearing: *see Tate v. Dubois*, 78 F.3d 577, (1st Cir. 1996); *Black v. Coughlin*, 76 F.3d 72 (2nd Cir. 1996); *Martucci v. Taylor*, 59 F.3d 170 (6th Cir. 1995); *Miller v. Indiana Dept. of Corr.*, 75 F.3d 330 (7th Cir. 1996); *Armento-Bey v.*

Petitioners claim that this rule is difficult to apply, and propose instead to overrule both *Heck* and *Wolff*. Petitioners offer an ambiguous and inconsistent rule that would require a district court to engage in nothing more than rank speculation. Under the proposed tests, the court would dismiss when a prisoner's allegations "could[23] also support a claim for restoration of good-time credits," no matter what the relief requested. Pet. Br. 7. Alternatively, if the prisoners' allegations "would[24] state a claim under habeas corpus" (*id.* at 17), or "would support a claim under habeas corpus" (*id.* at 24), the district court must dismiss.[25] It will be impossible for district

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Harper, 68 F.3d 215 (8th Cir. 1995); *Sheldon v. Hundley*, 83 F.3d 231 (8th Cir. 1996); *Gotcher v. Woods*, 66 F.3d 1097 (9th Cir. 1995); *Daniel v. Fields*, 66 F.3d 338 (10th Cir. 1995); *Best v. Kelly*, 39 F.3d 328 (D.C. Cir. 1994); District Court: e.g., *Dog Essence Saladin Amin v. Pruett*, ___ F.Supp. ___, Civ. No. A. 2:94CV635, 1996 WL 341522 (E.D. Va. June 12, 1996); Parole Hearings: *e.g., McGrew v. Texas Bd. of Pardons*, 47 F.3d 158 (5th Cir. 1995); *Bivens* Actions: *e.g., Martin v. Sias*, ___ F.3d ___, No. 95-36118, 1996 WL 368840 (9th Cir. 1996).

[23] Petitioners' first operative word is "could," defined as: used with hypothetical or conditional force; used to indicate tentativeness. American Heritage Dictionary of the English Language (Houghton Mifflin Company, 3d ed. 1992).

[24] Alternatively, Petitioners use "would," which is defined as: used to indicate uncertainty. American Heritage Dictionary of the English Language (Houghton Mifflin Company, 3d ed. 1992).

[25] The standard proposed by State Amici is at least a bit clearer: No right to federal protection of constitutional rights with regard to disciplinary hearings under § 1983 for state prisoners. State Am. Br. *passim*.

courts to consistently distinguish where the "bright line" is drawn under this proposed rule.[26]

Petitioners also assert that their proposed rule is necessary to give the Courts, rather than the prisoner, the power to decide questions of federal court jurisdiction. Pet. Br. 19. However, the prisoner's decision is illusory and subtracts nothing from the federal court's power to determine the validity of claims. Under the *Heck* rule, the prisoner has only one choice for injunctive relief and damages for procedural due process violations: a § 1983 claim in Federal Court. If the prisoner wants the hearing result reviewed or restoration of good-time credits there is also only one choice: exhaustion of state habeas corpus remedies before seeking federal court review.

2. Petitioners' Proposed Rule Would Deny Prisoners Any § 1983 Relief for Procedural Due Process Claims.

Under 28 U.S.C. § 1738, federal courts are required to accord preclusive effect to issues decided by state courts:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts

[26] In addition, such a rule would provide "an undeniable, and in all likelihood irresistible, incentive for state prison officials to defeat the jurisdiction of the federal courts by adding the deprivation of good-time credits to whatever other punishment is imposed." *Preiser v. Rodriguez*, 411 U.S. at 509 (Brennan, J., dissenting).

> of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

Preclusive effect has been specifically applied to state court judgments in subsequent federal § 1983 claims, where a state court would do the same, *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980), and not to federal habeas corpus claims. *Wright v. West*, 505 U.S. 277 (1992). *See Lato v. Sieverman*, 919 F.Supp. 336 (N.D. Cal. 1996); *Rooding v. Peters*, 876 F.Supp. 946 (N.D. Ill. 1995); *Hawkins v. Risley*, 984 F.2d 321 (9th Cir. 1993); *Jones v. Moore*, 996 F.2d 943 (8th Cir. 1993). *But see Rhodes v. Hannigan*, 12 F.3d 989 (10th Cir. 1993).

In *Allen*, this Court held that where a party had a full and fair opportunity to litigate the claim or issue decided by a state court, the judgments would be given preclusive effect in subsequent federal § 1983 suits. *Id.* at 104.

> Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of the decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments . . . .

Allen v. McCurry, 449 U.S. 90, 96 (1980).

This Court was not concerned about preclusion encroaching on an exclusive federal remedy because a § 1983 plaintiff does not have to file first in state court. *Id.* at 103-04. However, adopting a rule which requires a § 1983 plaintiff to go to state court first would undermine

the very intent of § 1983 to provide a federal forum for deprivation of constitutional rights.

A recent Second Circuit opinion highlights the effect of requiring prisoners to seek habeas corpus relief even when the proper claim would be § 1983. *Giakoumelos v. Coughlin*, ___ F.3d ___, 1996 WL 362708, *6 (2d Cir. 1996). The *Giakoumelos* Court found that an inmate was collaterally estopped from raising a § 1983 claim because he "[c]hose to litigate his claims by way of an Article 78 proceeding. Collateral estoppel in a subsequent § 1983 action is one of the risks attendant to his decision to follow that route." *Id.* at *6. The court expressed its concern about preclusion of a valid § 1983 claim "given the procedural laxity of such prison hearings, and the limited nature of substantial-evidence review." *Id.* at *5, quoting *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995).

Adopting abstention to fit the proposed rule is likewise inappropriate because the prisoner § 1983 due process claim attacks only a procedure which violates a federal constitutional right. The determination of a violation of procedural due process in Mr. Balisok's case does not require interpretation of a difficult or unclear state law. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). The State of Washington does not have an overriding interest in protecting federal constitutional rights nor do state courts have superior competence in federal constitutional law. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Mr. Balisok does not have an ongoing state proceeding in which he could obtain relief for the due process violations alleged in his Amended Complaint. *See Younger v. Harris*, 401 U.S. 37 (1971).

The rule of decision in Mr. Balisok's case is federal law and a decision in his case will not create piecemeal litigation because the subject matter and relief presented in his § 1983 claim is separate and distinct from what could be litigated in state court. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Federal courts have a "virtually unflagging obligation" to exercise their properly invoked jurisdiction absent the clear application of one of the established abstention doctrines. *Id.* at 817. None of the traditional abstention doctrines apply to Mr. Balisok's case and this Court should not create a new one by adoption of the Petitioners' test.

If abstention were important in prisoner § 1983 claims, Congress could have easily enacted such a provision in the latest round of legislative changes to prisoner litigation statutes. Resp. Br. § H.

> [A] prisoner's guarantee of a federal forum is infringed if the court stays the section 1983 action because, even under habeas corpus, federal courts are required to give state court findings of fact substantial deference. Requiring the federal court in the section 1983 claim to essentially adopt the state court's findings of fact would seriously undermine section 1983's guarantee of a federal forum because one of the purposes underlying the guarantee is mistrust of state fact-finding.

Weinman, *supra*, at 752. (citations omitted).

The Petitioners' proposed test would effectively deny many prisoners the very relief that Congress has specifically provided: that of a federal forum to redress certain constitutional violations. 42 U.S.C. § 1983 (1996).

3. Prisoner § 1983 Claims for Violations of Procedural Due Process Will Not Interfere with Prison Administration.

Petitioners contend that a district court decision will interfere with proper prison administration.[27] However, nothing in Mr. Balisok's case will lead to such a result. Mr. Balisok is asking the District Court to find that the practice of lying to inmates about the existence of witness statements and not "date-stamping" the witness statements in order to cover up the lying is unconstitutional and should be stopped. The prison system can still hold disciplinary hearings, exclude witnesses on legitimate grounds, and appropriately sanction the prisoner upon a determination of guilt. The only interference from the District Court would be to require that the prisoner receive the minimal due process already recognized by

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[27] The argument that federal judges lack the expertise to run prisons rests on a misconception of the judiciary's role in prison cases. The invalidation of a particular prison practice on constitutional grounds rarely, if ever, requires a court to assume management of the penal institution. Courts are the experts in constitutional law, and that is the basic issue in most prison suits. To the extent that other expertise is needed for accurate decision making, courts have been willing to be informed by the arguments of counsel and the taking of testimony, including the testimony of expert witnesses.

this Court.[28] *Wolff v. McDonnell*, at 558; *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445 (1985).

H. Congress is the Proper Governmental Body to Add Limitations and Exhaustion Requirements to § 1983.

This Court has held that additional exhaustion requirements should not be judicially imposed upon § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 514 (1982). In *Patsy*, the Court pointed out that the very difficulty of the policy considerations involved in adding an exhaustion requirement to § 1983 and the vehement debate in which Congress engaged during the passage of the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997, make it clear that "legislative, not judicial

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[28] Petitioners and State Amici refer to the burden and expense of dealing with *pro se* prisoner complaints. The possibility of being swamped with frivolous petitions never has been deemed a valid excuse for denial of constitutional rights. Justice Harlan addressed this point when he wrote that fear of burgeoning caseloads cannot "be permitted to stand in the way of the recognition of otherwise sound constitutional principles." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 (1971) (Harlan, J, concurring). *See also Cleavinger v. Saxner*, 474 U.S. 193, 207 (1985). This issue was addressed recently in the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 101(a) [§§ 801-810], 110 STAT 1321 (1996). Congress did not see fit to engraft a state court exhaustion requirement into § 1983. A more straight-forward way of dealing with burdensome prisoner § 1983 challenges to the procedures used in prison disciplinary hearings would be to require prison officers to "follow the clear and simple constitutional requirements of *Wolff v. McDonnell* . . . . " *Cleavinger*, 474 U.S. at 207.

solutions are preferable." *Id.* at 518.[29] *Cf. McCarthy v. Madigan*, 503 U.S. 140 (1992) (this Court refused to extend an exhaustion requirement to Bivens actions).

Judicially imposing a requirement that a prisoner must exhaust state court remedies before filing a § 1983 claim whenever the claim "could" also support a claim for restoration of good-time credits is also inconsistent with recently expressed congressional intent. *See* Prisoner Litigation Reform Act of 1995 ("PLRA"). Pub. L. No. 104-134, § 101(a) [§ 803(d), § 7(a)(b)], 110 STAT 13212 (1996). After lobbying by State Attorneys General, Congress recently amended 42 U.S.C. § 1997 to require prisoners to exhaust administrative procedures only, regardless of whether those procedures were federally certified. 42 U.S.C. § 1997e(a)(b) (1996). State Amici interpret the fact that Congress no longer limits the exhaustion requirement to prisons with certified grievance procedures as evidence that Congress "no longer has a mistrust for the fact finding processes of state institutions relied upon in reaching the no exhaustion rule announced in *Patsy*." State Am. Br. 12 n.7.

Congress had the opportunity to expand the "very narrow exhaustion requirement"[30] in the original enactment of § 1997 during the recent enactment of the PLRA. *Id.* During the process of testimony and debate with

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[29] CRIPA was enacted primarily to ensure that the United States Attorney General would have "legal standing to enforce existing constitutional rights and federal statutory rights of institutionalized persons." H.R. Conf. Rep. No. 96-897, p.9, Pub. L. 96-247, 1980 U.S.C.C.A.N. 787, 790.

[30] *Patsy v. Board of Regents*, 457 U.S. at 508.

regard to this act, the attorneys general of several states had the opportunity to speak.[31] Nowhere in the record is there mention of limiting prisoners' use of § 1983 by adding a state court exhaustion requirement as the Attorneys General of Washington and State Amici now propose. State Am. Br. 11. Congress, by amending the exhaustion section of § 1997, considered to what extent exhaustion requirements were appropriate for prisoner § 1983 lawsuits. PLRA at § 803(d) § 7(a)(b). Given the fact that Congress did not adopt a requirement for state court exhaustion, the legislative history simply does not demonstrate the confidence in state court remedies that Petitioners and State Amici assert. In this case, the congressionally-mandated requirement for exhaustion of administrative remedies has been met by Mr. Balisok. Pet. App. I-8.

Congress also was satisfied with *Wolff* and *Heck* as the controlling law involving prisoner § 1983 lawsuits. In defining what § 1983 prisoner lawsuits were permissible, the PLRA states:

> The term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions

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[31] The Congessional Record on enactment of the PLRA makes numerous references to statements or input from state Attorneys General on the PLRA. *See* 141 Cong. Rec. S7498-01, S7524-27 (May 25, 1995); 141 Cong. Rec. S10876-02, S10895-96 (July 28, 1995); 141 Cong. Rec. S14611-01, S14611-29 (September 29, 1995); 141 Cong. Rec. S18295-02, S18295-96 (December 8, 1995); Statement of Daniel E. Lungren, Attorney General of California, 1995 WL 18450 (F.D.C.H.), p.9 (January 19, 1995).

> of confinement or the effects of actions by governmental officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

PLRA, § 802(a)(g)(2), amending 28 U.S.C. § 3626.

This language adopted by Congress embodies the same legal standards articulated in *Preiser, Wolff,* and *Heck. See* Resp. Br. §§ A, B.

1. Congress Has Addressed the States' Concerns For § 1983 Prisoner Claims.

The States' concerns for limited resources and judicial economy were raised in Congress by the State Attorneys General. *See* n.31. Congress responded to this lobbying by amending § 1997 to include a number of new procedures and penalties for prisoners filing § 1983 lawsuits. Prisoners now have a financial risk with § 1983 lawsuits. Twenty-five percent of their judgment must go toward the payment of any attorney fee.[32] PLRA, § 803(d)(2), amending 42 U.S.C. § 1997e.

Prisoners proceeding *in forma pauperis* must now pay the full amount of the court filing fee with monthly payments equal to twenty percent (20%) of the prisoner's trust fund account. PLRA, § 804(b)(1), amending 28

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[32] The "threat" that attorneys will also seek to circumvent habeas corpus remedies because of the attorney fee provision (Pet. Br. 22 n.13) has also been addressed by Congress. *See* PLRA, § 803(d). Additionally, Attorney of Record in this case accepted the District Court's appointment *pro bono*.

U.S.C. § 1915. Prisoners must also pay the full amount of any cost assessed against them out of their prison trust fund. PLRA, § 804(c)(2)(A),(B) amending 28 U.S.C. § 1915(f). Congress added a "three strikes" provision to stop multiple suits by a single prisoner. PLRA, § 804(d), amending 28 U.S.C. § 1915 to add new subsection (g). Subsection (g) prevents a prisoner who has filed three or more frivolous, malicious, or failure to state a claim lawsuits, while incarcerated or detained, from filing any civil action "unless the prisoner is under imminent danger of serious physical injury." PLRA, § 804(d), adding 28 U.S.C. § 1915(g). Any damage award to the prisoner must first be paid directly to satisfy any outstanding restitution order. PLRA, § 807. Prior to payment, notice must also be given to the victims of the crime for which the prisoner is incarcerated for payment of any compensatory damage award the victim has against the prisoner. PLRA, § 808.

"It is for Congress to determine whether § 1983 litigation has become too burdensome to state and federal institutions and, if so, what remedial action is appropriate." *Tower v. Glover,* 467 U.S. 914 (1984). Congress has unequivocally exercised its prerogative to fashion limits on prisoner access to § 1983 lawsuits. The additional limits sought by Petitioners and their Amici should be addressed to Congress, not to this Court.

I. 42 U.S.C. § 1983 Recognizes the Fundamental Role of the Federal System in Protecting Those Constitutional Rights Guaranteed to All Citizens, Even Prisoners.

The federal courts recognize the importance of prison access to an independent federal forum for certain constitutional violations.

> We have become a more civilized society because of the protections [§ 1983] affords those under police arrest or confined to penal institutions. Thanks to § 1983, and concurrent prison reforms, we no longer tolerate the degrading experiences. . . . Nor do we tolerate the dehumanizing treatment that once existed in prisons, where an inmate was denuded of his dignity, stripped of his name, addressed by only an identification number, and constantly ran the risk of being brutally beaten or tossed into "the hole" indefinitely, at the sole whim of a prison guard.

Hernandez v. Denton, 861 F.2d 1421, 1428 (9th Cir. 1988) (Aldisert, Circuit Judge, dissenting), *vacated and remanded on other grounds*, 504 U.S. 25 (1992).

Federal courts permitted prisoner lawsuits under § 1983 when judges could no longer ignore the appalling conditions in state prisons. Eisenberg, *supra*, at 424. Many of the prison reforms that took place were a result of the federal courts' willingness to interpose themselves between the prisoners and the states in order to redress constitutional violations. *Id.*

Petitioners and State Amici suggest that state remedies are now adequate, and prisoner access to § 1983

is no longer necessary to protect prisoners' federal rights. Pet. Br. 23; State Am. Br. 3. This suggestion is not without contradiction. In *Madrid v. Gomez*, California prisoners sought injunctive and declaratory relief under 42 U.S.C § 1983. *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995). They challenged the constitutionality of a broad range of conditions and practices in the Pelican Bay prison. *Id.* at 1155. Finding in favor of the prisoners on many of their allegations, the court stated:

> Dry words on paper can not adequately capture the senseless suffering and sometimes wretched misery that defendants' unconstitutional practices leave in their wake.
>
> . . .
>
> Defendants have shown no indication that they are committed to finding permanent solutions to problems of serious constitutional dimension. On the contrary, defendants have expended most of their energies attempting to deny or explain away the evidence of such problems.
>
> . . .
>
> Indeed, the Court is left with the opinion that, even given the evidence presented at trial, defendants would still deny that any condition or practice at Pelican Bay raises any cause for concern, much less concern of a constitutional dimension.

Id. at 1280-81. It is in the wake of this case that State Amici propose a rule that would foreclose important § 1983 relief for prisoners.[33]

Petitioners and State Amici repeatedly refer to federal-state comity in their effort to persuade this Court to impose an exhaustion requirement that has never been legislatively written into § 1983. This argument ignores the basic fact that some federal-state conflict is inherent in § 1983. The Civil Rights Act's purpose is to create federal review of unconstitutional state practices. Federal courts are careful to defer to the state with regard to the management of prisons: "We must be careful not to stray into matters that our system of federalism reserves for the discretion of state officials." *Madrid*, 889 F.Supp. at 1279. However, the purpose behind § 1983 recognizes that there are times when it is necessary. "At the same time, we have no duty more important than that of enforcing constitutional rights, no matter how unpopular the cause or powerless the plaintiff." *Id.*

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[33] It is axiomatic that the structure of prison systems and the demeaning nature of prison life leads to conflict between prisoners and their keepers. The inherent power differential will result in abuse, sometimes of constitutional proportions. This is perhaps best illustrated by a line from the prison diary of Sol Wachtler, former Chief Judge of New York State: "Forget it: As prisoners, you will never be thought of as people." Sol Wachtler, *The Prison Odyssey of Sol Wachtler*, N.Y. Times, March 10, 1996, § 4 at 1.

V. CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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